

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATE OF MISSISSIPPI

Petitioner,)

v.)

No. 2013-M-01220-SCT

ROBERT SCHULER SMITH, ET AL.)

Respondents.)

APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

**BRIEF OF *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION, INC.
IN SUPPORT OF THE STATE OF MISSISSIPPI'S
PETITION FOR INTERLOCUTORY APPEAL AND MOTION TO VACATE**

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v.)	No. 2013-M-01220-SCT
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Respondents, as listed in the full caption
2. Lisa Mishune Ross, Counsel for Respondents
3. State of Mississippi, Petitioner
4. Harold E. Pizzetta III, Office of the Attorney General, Counsel for State of Mississippi
5. National Rifle Association, Inc., *Amicus Curiae*
6. Clarence T. Guthrie III, Counsel for National Rifle Association, Inc.

So certified, this the 29th day of July, 2013.

s/Clarence T. Guthrie III
Clarence T. Guthrie III, (MSB#99432)
*Counsel of record for Amicus Curiae National Rifle
Association of America Inc.*

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INTEREST OF AMICUS CURIAE

The interests of *amicus curiae* National Rifle Association of America Inc., (“NRA”) are more fully set forth in the accompanying motion for leave to file this brief. The NRA has a strong interest in upholding the rights of its members and all law-abiding citizens to keep and bear arms as protected under both state and federal law. These include its members who are citizens of the state of Mississippi, who are represented by the Office of the Attorney General, as well as firearms owners who are not citizens of Mississippi. The NRA and its members have substantial legitimate interests that will likely be affected by the outcome of the case, and these interests are neither adequately represented nor protected by those already a party to the case.

STATEMENT OF ISSUES

Whether the trial court erred as a matter of law when it declared House Bill 2 (“HB 2”) to be unconstitutionally vague on its face and permanently enjoined the statutory amendments in HB 2 from becoming the law of the State of Mississippi.

STATEMENT OF THE CASE

The NRA incorporates by reference the “Procedural Background” portion of the State of Mississippi’s Petition for Interlocutory Appeal.

Essentially, a group of persons, including the Hinds County District Attorney, the Sheriff of Hinds County, and a number of elected constables, legislators, and concerned citizens, waited until 4:20 p.m. on the last day before HB 2 was to become effective, and filed what is essentially a facial challenge to its constitutionality. After a hearing, the Circuit Court of Hinds County granted an Injunction “until such time as the Mississippi Legislature amends or clarifies House

Bill 2 during the next Legislative Session as it relates to a citizen's right to openly carry a weapon in a holster without the requirement of a permit.” See Order at ¶ 8.

SUMMARY OF THE ARGUMENT

The United States Supreme Court has held that some liberties are so important that they are deemed to be “fundamental rights” and that generally the government cannot infringe them unless strict scrutiny is met. The Second Amendment, which provides that “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed,” is one such right. This right was confirmed by the Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008)¹ and found to apply to the states through the Fourteenth Amendment in *McDonald v. Chicago*, 561 U.S. 3025 (2010).

Much like lawful place and manner restrictions on speech protected by the First Amendment, the Supreme Court has noted with regard to the Second Amendment that “nothing...should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms” *Heller*, 554 U.S. at 626-27. Likewise, this Court has upheld Mississippi’s prohibition on the possession of firearms by felons against a challenge under Mississippi’s constitutional right to keep and bear arms, indicating that the State maintains the ability to reasonably regulate firearms in the interest of public safety. *James v. State*, 31 So.2d 1135 (Miss. 1999).

In light of this precedent, certain narrowly-tailored state and federal firearm laws, including those pertaining to prohibited persons and prohibited places, can be presumed to remain valid.

¹ Resolving a debate that had been ongoing for the better part of a century, the Court concluded that the text, structure, and history of the Second Amendment confirm that it “confer[s] an individual right to keep and bear arms.” *Heller* 554 U.S. at 595.

Accordingly, the Circuit Court's claim that HB 2 "creates confusion and chaos with respect to the enforcement of gun laws in this state" Order at ¶ 6, is unfounded, and the NRA endeavors to assist this Court with a review of the federal firearms laws which would prevent the six questions and hypothetical examples of "chaos" outlined in the Circuit Court's opinion. *See* Order at ¶ 6. In doing so the NRA will demonstrate that HB 2's clarification of the law and Article 3, Section 12 of the Mississippi Constitution² is both clear and unambiguous.

ARGUMENT

I. Current state and federal laws adequately address who may and may not possess a firearm

"House Bill 2 does not clearly set forth 'who' is allowed to openly carry a weapon in a holster."³ - Order at ¶ 6

While the Circuit Court veils its question using the broad term "weapon," the alleged concern over who is allowed to openly carry a weapon in a holster appears to be solely related to firearms, as the word holster, absent any prefix such as knife, is broadly defined by Merriam-Webster as "a leather or fabric case for carrying a firearm on the person (as on the hip or chest), on a saddle, or in a vehicle". Merriam Webster's Online Dictionary, <http://www.merriam-webster.com/dictionary/holster> (last visited on 7/25/2013). Furthermore, the use of the word "holster" as contained in the definition of the term "concealed" contained in the amended Code Section which has given rise to this issue, Mississippi Code Section 97-37-1, pertains to firearms, whereas the use of the terms "scabbard," "case," and "sheath" were included to ensure

² "The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons." MS Const. Art. 3, § 12

³ The argument has been broken into six sections. Each section addresses a specific concern raised by the Circuit Court in alleged justification of its claim that HB 2 "creates confusion and chaos with respect to the enforcement of gun laws here in this state". *See* Order at ¶ 6.

that the other weapons⁴ included in the code section were adequately addressed. Accordingly, it appears that the court is solely limiting its question to the carrying of firearms in a holster,⁵ but this limitation only causes confusion as to why the question was even posed.

As addressed by the State, Mississippi law already regulates who may lawfully possess a firearm.⁶ In addition, there exists an extensive list of individuals prohibited from possessing a firearm, whether openly or concealed, under Federal law, and specifically the Gun Control Act of 1968. A small amount of research into existing valid law forecloses the possibility of any vagueness or confusion regarding this issue.

Moreover, HB 2's narrowing of the prohibition on carrying firearms creates no implication that other existing restrictions are now somehow unenforceable. This Court has held that Miss. Code Ann. § 97-37-1(2), under which the general ban on concealed carrying of weapons does not apply to "person[s] over the age of eighteen (18) years [who] carry a firearm or deadly weapon concealed in whole or in part within the confines of [their] own home[s]..." could not be read to override Miss. Code Ann. § 97-37-5, which prohibits felons from possessing firearms.

James v. State, 731 So.2d 1135, 1137-1138 (Miss. 1999). The Court reasoned that:

[a]lthough both are statutory schemes to regulate weapons, it is a limitation on two different areas—the carrying of concealed weapons...and the possession of firearms and other weapons by convicted felons. If the legislature wanted to allow felons to possess firearms in their homes, it was perfectly capable of saying so.

⁴ Miss. Code. Ann. § 97-37-7(1) list of weapons covered by the act includes: "bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, slingshot, pistol, revolver, or any rifle with a barrel of less than sixteen (16) inches in length, or any shotgun with a barrel of less than eighteen (18) inches in length, machine gun or any fully automatic firearm or deadly weapon, or any muffler or silencer for any firearm..."

⁵ This assumption is further supported by the Circuit Court's continuous reference to HB 2 as a "gun law" despite its clear applicability to other weapons. See Order at ¶ 1-2.

⁶ Miss. Code Ann. § 97-37-5 (possession of a firearm or any bowie knife, dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, or any muffler or silencer for any firearm by a felon is unlawful); Miss. Code Ann. § 97-37-14 (possession of a handgun by a minor is an act of delinquency).

Id. The same reasoning applies in the present case since HB 2 regulates the carrying of firearms, while the authorities that will be discussed herein regulate who may possess or acquire firearms in the first place and places where possession of a firearm is prohibited.

The Gun Control Act of 1968 was the first comprehensive federal statute regulating commerce in firearms. In 1986 it was amended by the Firearm Owners' Protection Act, in which the purpose of both Acts was set forth:

CONGRESSIONAL FINDINGS. — The Congress finds that —

(1) the rights of citizens —

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and tenth amendments;

require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that “it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.”

Pub. L. No. 99-308, 100 Stat. 449, § 1(b) (May 19, 1986).

Section 922 of the Gun Control Act addresses unlawful acts involving firearms, and subsection (g) of Section 922 specifically addresses those individuals prohibited from possessing firearms or ammunition. This section alone not only provides reasonable assurances that individuals deemed unfit to possess firearms under federal law will be unable to openly carry a firearm in a holster but also answers the Circuit Court's question regarding who would be able to openly carry a firearm in Mississippi. Per 18 U.S.C. § 922(g):

(g) It shall be unlawful for any person--

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien--

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that--

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C.A. § 922(g).

Mississippi law also creates categories of persons prohibited from possessing firearms or other deadly weapons, specifically felons,⁷ intoxicated persons (to whom others are prohibited from transferring firearms),⁸ and, with respect to handguns, minors (subject to certain exceptions).⁹ Nothing in HB 2 suggests that these laws are now unenforceable.

Thus, HB 2 did not need to specifically address who may openly carry a firearm. Other applicable laws answer this question by prohibiting certain categories of persons from possessing firearms generally or handguns specifically.

II. Current state and federal laws adequately address where a person may openly carry a firearm in a holster

“House Bill 2 does not state ‘where’ an individual can openly carry a weapon in a holster.” - Order at ¶ 6

The Circuit Court erred in assuming that HB 2 is a complete regulatory scheme. While the State of Mississippi has already provided an analysis of state laws highlighting the flawed

⁷ Miss. Code. Ann. § 97-37-5.

⁸ Miss. Code. Ann. § 97-37-13.

⁹ Miss. Code. Ann. § 97-37-13, 97-37-14, 97-37-15.

analysis of the Circuit Court, there are several places where carrying or possessing a firearm under federal law is a crime.

For example, federal law provides that “[i]t shall be unlawful for any individual knowingly to possess a firearm...at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(2)(A); *See* 18 U.S.C. § 921(a)(25) for the definition of a “school zone.”

It is also generally illegal to possess a firearm in any federal facility. “[W]hoever knowingly possesses or causes to be present a firearm or other dangerous weapon in a federal facility (other than a Federal court facility), or attempts to do so, shall be fined under this title or imprisoned not more than 1 year, or both. 18 U.S.C. § 930(a); *See* 18 U.S.C. § 930(g)(1) for the definition of “federal facility.”

It has been illegal to possess a firearm on United States Post Office property since 1972, when the United States Postal Service enacted 39 C.F.R. § 232.1(l), which provides that:

Notwithstanding the provisions of any other law, rule or regulation, no person while on postal property may carry firearms, other dangerous or deadly weapons, or explosives, either openly or concealed, or store the same on postal property, except for official purposes.

See also U.S. v. Dorosan, 350 Fed.Appx. 874 (5th Cir. 2009)(affirming a conviction where a postal employee had a firearm in their car on the Post Office’s parking lot) (*Cert. Denied Dorosan v. U.S.*, 559 U.S. 983 (2010)) (this ruling has been modified to not properly include possession outside of a structure on post office property. *See Bonidy v. U.S. Postal Service*, Not Reported in F.Supp.2d, 2013 WL 3448130, D.Colo., July 09, 2013 (NO. 10-CV-02408-RPM)).

Additionally, the Nuclear Regulatory Commission has introduced regulations pursuant to 42 U.S.C. § 2278a that prohibit possessing firearms on nuclear facilities. These regulations provide that all facilities must post notices that state: “The willful unauthorized introduction of any

dangerous weapon...into or upon these premises is a federal crime.” 10 C.F.R. 73.75(b)(3); *See also U.S. v. Thompson*, 687 F.2d 1279, 1282 (10th Cir. 1982) (affirming a conviction based on a prior regulation enacted under 42 U.S.C. § 2278a).

All of these federal prohibitions remain in place. The same is true of the numerous places set forth in Mississippi law where firearms or other deadly weapons are specifically prohibited without regard to whether the person is carrying pursuant to a concealed weapons license.¹⁰ Finally, as the State noted in its Combined Petition for Interlocutory Appeal and Motion to Vacate Permanent Injunction, owners of private property and private businesses still maintain their traditional rights under the laws of trespass to determine who enters their properties and under what conditions. The Circuit Court erred in ruling that HB 2 was vague for not stating where individuals can open carry when numerous other authorities already do so.

III. Mississippi is not constitutionally obligated to regulate the open carrying of firearms in a certain manner

“If the law goes into effect, individuals will attempt to openly carry weapons anywhere and everywhere.” – Order at ¶ 6

While this hypothetical turns a blind eye to the host of prohibitions listed above, most strikingly the Court fails to take into consideration the law as it both existed before enactment of HB 2 and as it currently stands. As noted by the State, HB 2 did not create a mechanism for individuals to openly carry weapons throughout the state, but instead merely clarified the pre-existing right to do so that is recognized in Mississippi’s Constitution.¹¹ What seems most remarkable about the Respondent’s claims and the Circuit Court’s Order is that they are ultimately grounded on the idea that Mississippi is somehow constitutionally obligated to

¹⁰ Miss. Code. Ann. §§ 41-19-15, 41-19-116, 41-19-155, 41-19-211, 41-19-243, 41-19-279, 41-19-291, 41-19-301, 97-37-17.

¹¹ “In short, the legislature clarified that it is not a crime under state law to openly carry firearms without a permit”. State of Mississippi’s Combined Pet. For Interlocutory Appeal and Mot. To Permanent Inj. at 3

regulate the open carrying of firearms in a certain manner, when the Mississippi Constitution specifically limits such regulation. While the federal and state rights to arms, as noted above, do not necessarily preclude every conceivable type of regulation on open carry, they certainly do not affirmatively require the state to regulate open carry in a specific manner to the liking of the Respondents, or even at all. Indeed, as far as constitutional law is concerned, the mere carrying of arms need not be regulated at all (the Respondents and the Circuit Court have not cited any authority to the contrary). Certainly total deregulation of the carrying of arms could present vexing practical problems for law enforcement, but that would not make such deregulation unconstitutionally vague. The same is also true of the more limited deregulation in HB 2.

IV. Current state and federal laws adequately address the Circuit Court’s “walking down the street with a hand on a holster” hypothetical

“Is it a violation for an individual to walk down the street with their hand on the weapon or holster?” – Order at ¶ 6

While not an issue creating ambiguity with the law, this question raises concerns which may only be addressed by an analysis of the specific facts giving rise to the placement of one’s hand on the weapon or holster.

For example, it would be unreasonable for the Court to be concerned with an individual placing their hand on the weapon or holster while walking down the street in order to retrieve such weapon for use in a self defense situation, just as it would be unreasonable for one to assume that placing ones hand on a firearm or holster to prevent someone else from accessing it would be, especially in light of case law in the state.¹²

¹² *Talley v. State*, 164 So. 771-172 (Miss. 1935). (Defendant could not be convicted when he drew his pistol in “a rude, angry, or threatening manner” when “he was threatened, and had good and sufficient reason to apprehend a serious attack from any enemy, and that he did so apprehend.”); See also *Chandler v. State*, 272 So.2d 641, 644 (Miss. 1973) (“Moreover, after the appellant attacked the officer he had no choice, he had to arrest the appellant to prevent him from taking his gun and to prevent a breach of the peace.”).

Accordingly, answering the question without further information about the context in which the behavior occurred is impossible. However, several sections of Mississippi Code and an analysis of the federal sentencing guidelines address the legality of actions that seem to concern the Circuit Court based on either the intent with which they were undertaken or their tendency to provoke fear or alarm because of the specific circumstances.

It is assumed the Circuit Court has raised this issue out of concern that an individual may touch their weapon or holster in a manner deemed threatening by a reasonable person. Such touching is not only clearly unlawful under Mississippi Code Section 97-37-19, but the U.S. Sentencing Guidelines Manual considers it an enhancing factor in the determination of a federal sentence.¹³ Per Mississippi Code Section 97-37-19:

If any person, having or carrying any dirk, dirk-knife, sword, sword-cane, or any deadly weapon, or other weapon the carrying of which concealed is prohibited by Section 97-37-1, shall, in the presence of another person, brandish or wield the same in a threatening manner, not in necessary self-defense, or shall in any manner unlawfully use the same in any fight or quarrel, the person so offending, upon conviction thereof, shall be fined in a sum not exceeding Five Hundred Dollars (\$500.00) or be imprisoned in the county jail not exceeding three (3) months, or both. In prosecutions under this section it shall not be necessary for the affidavit or indictment to aver, nor for the state to prove on the trial, that any gun, pistol, or other firearm was charged, loaded, or in condition to be discharged.

Miss. Code Ann. Section 97-37-19.

Additionally, the state of Mississippi considers the use or display of a firearm during the commission of any felony a factor which would enhance the punishment provided for by such felony.¹⁴ Mississippi laws also address the possibility of an individual touching

¹³ The U.S. Sentencing Guidelines Manual uses both “brandished” and “otherwise used” when determining increases in penalty levels. “‘Brandished’ with reference to a dangerous weapon (including a firearm) means that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person. Accordingly, although the dangerous weapon does not have to be directly visible, the weapon must be present.” U.S. Sentencing Guidelines Manual § 1B1.1, comment (n.1(C)); “‘Otherwise used’ with reference to a dangerous weapon (including a firearm) means that the conduct did not amount to the discharge of a firearm but was more than brandishing, displaying, or possessing a firearm or other dangerous weapon.” *Id.* at comment (n.1(I)).

¹⁴ **§ 97-37-37. Firearms enhancement**

(1) Except to the extent that a greater minimum sentence is otherwise provided by any other provision of law, any person who uses or displays a firearm during the commission of any felony shall, in addition to the punishment

a weapon or holster in a manner not as severe as one would find under the brandishing statute, but in such a manner as to intentionally create a disturbance or breach of the peace. Mississippi Code Annotated Sections 97-35-13 and 97-35-15 speak to this directly.¹⁵ While merely placing one's hand on a weapon or holster without any other action, for example touching the weapon or holster to adjust its positioning to a more comfortable location on the body, is clearly not a disturbance of the peace, a violation could be triggered by the touching of the weapon or holster if it is determined the touching was done to provoke a breach of the public peace.

While the Circuit Court fails to identify the reasoning for the question or provide an explanation as to why the mere fact that it was raised justifies the conclusion that HB 2 is unconstitutional, it is apparent that Mississippi law already answers the Court's concern.

provided for such felony, be sentenced to an additional term of imprisonment in the custody of the Department of Corrections of five (5) years, which sentence shall not be reduced or suspended.

(2) Except to the extent that a greater minimum sentence is otherwise provided by any other provision of law, any convicted felon who uses or displays a firearm during the commission of any felony shall, in addition to the punishment provided for such felony, be sentenced to an additional term of imprisonment in the custody of the Department of Corrections of ten (10) years, to run consecutively, not concurrently, which sentence shall not be reduced or suspended. Miss. Code Ann. § 97-37-37; see also *Ford v. State*, 69 So.3d 788, 794 (Miss. App. 2011) (“Section 97-37-37(1) ‘is clearly a sentence enhancement and does not set out separate elements of the underlying felony.’”) (quoting *Mayers v. State*, 42 So.3d 33, 45 (Miss. App. 2010)).

¹⁵ **§ 97-35-13. Disturbance in public place** Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Mississippi, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate, or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars (\$500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment. Miss. Code Ann. § 97-35-13.

97-35-15. Disturbance of the peace

(1) Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment in the county jail not more than six (6) months, or both. (2) The act of breast-feeding shall not constitute a breach of the peace. (3) The provisions of this section are supplementary to the provisions of any other statute of this state. Miss. Code Ann. § 97-35-15

V. Current state and federal laws adequately address the Circuit Court’s concern over law enforcement’s ability to identify threats to the public

“How are law enforcement individuals to determine which individuals are a threat to the general public?” –Order at ¶ 6

The ability of law enforcement officers to thwart threats to the general public while respecting individual rights is an issue that plagues law enforcement, and it is neither heightened nor extinguished through HB 2. A wealth of case law addresses the issue, and *Terry v. Ohio*, 392 U.S. 1 (1968) serves as the leading authority.

Terry holds that police may stop and frisk suspects on the street if they have a reasonable suspicion that the person has committed, is committing, or is about to commit a crime and that person “may be armed and presently dangerous”. *Id.*, at 30. Expanding on *Terry*, the U.S. Supreme Court in *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004) ruled that “stop and identify” statutes which “permit an officer to ask or require a suspect to disclose his identity” *Id.* at 183, are valid so long as the initial stop is based on reasonable suspicion and there exists a valid state “stop and identify” statute. Unlike approximately 25 other states,¹⁶ Mississippi does not have such a law, but the lack of such does not justify an unconstitutional infringement on individual rights.

Furthermore, law enforcement officers can also take certain actions under the community caretaking function. “In applying the community caretaking function, ‘[t]he ultimate standard ... is reasonableness....’ The question becomes whether a reasonable person, ‘given the totality of the circumstances, would believe the individual is in need of help’ or that the safety of the public

¹⁶ AL, Ala. Code § 15-5-30; AZ, Ari. Rev. Stat. Tit. 13, §2412; AR, Ark. Code Ann. §5-71-213(a)(1); CO, Colo. Rev. Stat. §16-3-103(1); DE, Del. Code Ann., Tit. 11, §§1902, 1321(6); FL, Fla. Stat. § 901.15; §856.021(2); GA, Ga. Code Ann. §16-11-36(b); IL, Ill. Comp. Stat., ch. 725, §5/107-14; IN, Indiana Code §34-28-5-3.5; KA, Kan. Stat. Ann. §22-2402(1); LA, La. Code Crim. Proc. Ann., Art. 215.1(A); La. Rev. Stat. 14:108(B)(1)(c); MO, Mo. Rev. Stat. §84.710(2); MT, Mont. Code Ann. §46-5-401; NE, Neb. Rev. Stat. §29-829; NV, Nev. Rev. Stat. §171.123; NH, N.H. Rev. Stat. Ann. §594:2, §644:6; NM, N.M. Stat. Ann. §30-22-3; NY, N.Y. Crim. Proc. Law §140.50; ND, N.D. Cent. Code §29-29-21; OH, Ohio Rev. Code §2921.29; RI, R.I. Gen. Laws §12-7-1; TX, Texas Penal Code §38.02(a)(b); UT, Utah Code Ann. §77-7-15; VT, Vt. Stat. Ann., Tit. 24, §1983; WI Wis. Stat. §968.24

is endangered.” *Trejo v. State* 76 So.3d 684, 689 (Miss. 2011) (Internal citations omitted). Like *Terry*, *Trejo* serves as an authority to law enforcement officers on which individuals they can and cannot engage, and to what extent, and this existing authority appears to have been overlooked before the question was posed. Law enforcement officers have a number of options under constitutional precedents to investigate what they reasonably suspect to be criminal activity or merely to engage citizens in voluntary, non-coercive contacts to help them gain information and keep the peace. House Bill 2 does nothing to change that.

VI. Current state and federal laws adequately address the Circuit Court’s “young men in the street with weapons” hypothetical

What, if anything, can law enforcement do to address the hypothetical of five young men walking down a busy street, one carrying a pistol in a holster on his belt, one carrying a machete, one carrying a machine gun, one carrying a fully automatic firearm, and the other carrying a rifle. - See Order at ¶ 6

The scenario proposed by the Circuit Court involving a group of young men walking down the street carrying various weapons raises concern given the assumption that such a situation would cause alarm that “[r]easonable, law abiding citizens should not be subject to...” See Opinion at ¶ 6.

For instance, if these five men were law enforcement officers would the court surmise that reasonable, law abiding citizens should not be exposed to them? Furthermore, given the federal and state laws addressed above, and absent one or all of the individuals being prohibited under state or federal law, a “reasonable, law abiding citizen” should possess no more fear upon the mere sight of a firearm than upon the mere sight of any other lawful but potentially harmful item. Of course, if the persons in possession of the items were displaying other behavior or carrying them under specific circumstances that would incite fear or alarm, the police could intercede, as discussed above. Yet the Respondents’ subjective concern or distaste for the mere sight of

firearms does not create a constitutional question, nor is it sufficient reason for a court to find the legislature is somehow constitutionally required to regulate the open carrying of firearms. In this regard, the Circuit Court would not only validate the Respondents' heckler's veto on the individual exercise of the right to bear arms, but would extend that veto to the legislature's broader recognition of that right in HB 2.

Indeed, similar regimes to the one contemplated by HB 2 currently exist in many states, with concealed carry generally banned but permissible with a permit, and open carry not per se illegal but subject to regulations governing prohibited persons, prohibited places, and prohibited brandishing or other threatening behavior.¹⁷

CONCLUSION

House Bill 2 clarifies the right protected by Article 3, Section 12 of the Mississippi Constitution by defining previous (and current) terms of the law. The right to open carry in the state was not affected by HB 2, and the Circuit Court's attempt to prevent "chaos" by enjoining it fails to recognize that open carrying in Mississippi has and will continue in its absence.

The concerns raised by the Circuit Court are wholly unfounded and are easily dispelled by a review of both state and federal law. The Circuit Court notes that "[r]easonable, law abiding citizens should not be subject to this type of behavior". *See* Opinion at ¶ 6. While such a notation is unjustified in light of the argument above, when applied to the lack of legal reasoning of the Respondents as ratified the Circuit Court in reaching its conclusion, one must agree that a

¹⁷ *See* Opencarry.org, <http://www.opencarry.org/> (last visited 7/25/2013)(general information on status of firearms laws); *See also* Open carry in the United States, http://en.wikipedia.org/wiki/Open_carry_in_the_United_States (last visited 7/25/2013)(general information on current status of firearms laws, with maps).

political opinion masked under the limited authority of the Circuit Court is in fact a type of behavior to which law abiding citizens should not be subjected.

WHEREFORE, PREMISES CONSIDERED, *amicus curiae* National Rifle Association of America, Inc. respectfully requests that this Court grant the State of Mississippi's petition for interlocutory appeal, and immediately vacate the permanent injunction pending its resolution. The NRA respectfully requests the opportunity to participate in any further briefing required by this Court before reaching a decision, and requests any other just and proper relief.

Respectfully submitted, this the 29th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing pleading or other paper with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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Further, I hereby certify that I have mailed by United States Postal Service the document to the following non-MEC participants:

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So certified, this the 29th day of July, 2013.

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